

2013 IL App (1st) 113587-U

THIRD DIVISION
January 23, 2013

No. 1-11-3587

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAMONA DAVIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 11 CH 21850
SUPERINTENDENT OF POLICE OF THE CITY OF)	
CHICAGO and POLICE BOARD OF THE CITY OF)	
CHICAGO,)	Honorable
)	Kathleen M. Pantle,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Sterba and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff's complaint for administrative review was dismissed for want of prosecution and she refiled after the passage of the one-year time period provided by section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 2010)), the trial court properly granted defendants' motion to dismiss.

¶ 2 In this *pro se* appeal, plaintiff, Ramona A. Davis, challenges the trial court's order granting the motion to dismiss filed by defendants, the Superintendent of Police of the City of Chicago and the Police Board of the City of Chicago. On appeal, plaintiff contends that her refiled action should

not have been dismissed as untimely because she refiled it within one year of this court's dismissal of her earlier appeal because it was premature. For the reasons that follow, we affirm.

¶ 3 In 2009, plaintiff was discharged from her position as a Chicago police officer. Plaintiff filed a complaint for administrative review, which was dismissed for want of prosecution on November 8, 2009. A motion to vacate that dismissal was denied on August 18, 2010. On September 7, 2010, plaintiff filed a notice of appeal. This court dismissed the appeal as premature on March 18, 2011, holding that the dismissal for want of prosecution was not a final and appealable order.

¶ 4 On June 17, 2011, plaintiff filed a new complaint for administrative review. Defendants moved to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code), arguing that the action was barred by the statute of limitations. 735 ILCS 5/2-619 (West 2010). The circuit court granted the motion, holding that the action was untimely since it was refiled more than one year after it had been dismissed by the trial court.

¶ 5 On appeal, plaintiff contends that her action should not have been dismissed as untimely. She argues that she refiled within one year of this court's dismissal of her earlier appeal as premature, and that therefore, her action was permitted under section 13-217 of the Code (735 ILCS 5/13-217 (West 2010)). Plaintiff maintains that she could not have refiled her action until this court dismissed her earlier appeal, since, under section 2-619(a)(3) of the Code, an action must be dismissed if there is another action pending between the same parties for the same cause. 735 ILCS 5/2-619(a)(3) (West 2010). She asserts that when she filed her notice of appeal in this court, the circuit court was divested of jurisdiction, even though the appeal was later dismissed as premature. Thus, according to plaintiff's argument, she could not have refiled the action until after the appeal was dismissed.

¶ 6 Under section 2-619(a)(5) of the Code, a cause of action may be dismissed if it was not commenced within the applicable statute of limitations. 735 ILCS 5/2-619(a)(5) (West 2010). We review an order granting a motion to dismiss pursuant to section 2-619 of the Code *de novo*. *Czarowski v. Lata*, 227 Ill. 2d 364, 369 (2008). The applicability of a statute of limitations presents

a legal question which is subject to *de novo* review. *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 466 (2008).

¶ 7 In general, an action to review a final administrative decision must be commenced within 35 days from the date that a copy of the decision was served upon the affected party. 735 ILCS 5/3-103 (West 2010). However, under section 13-217 of the Code, if an action is dismissed for want of prosecution, the plaintiff may commence a new action "within one year or within the remaining period of limitation, whichever is greater, after *** the action is dismissed for want of prosecution." 735 ILCS 5/13-217 (West 2010); see also *Behling v. Department of Labor*, 171 Ill. App. 3d 804, 807 (1988) (provisions of section 13-217 apply to administrative review).

¶ 8 Here, plaintiff's action for administrative review was dismissed for want of prosecution on November 8, 2009. Pursuant to section 13-217, she had one year to refile her action. Instead of doing so, plaintiff appealed to this court. Unfortunately for plaintiff, a dismissal for want of prosecution is not a final and appealable order until the one-year window to refile under section 13-217 has expired. *LaSalle National Trust, N.A. v. Lamet*, 328 Ill. App. 3d 729, 733 (2002). Therefore, this court correctly dismissed the appeal.

¶ 9 Plaintiff argues that when she filed her notice of appeal in this court, the circuit court was divested of jurisdiction, and therefore, she could not have refiled the action until after the appeal was dismissed. It is true that when a proper notice of appeal is filed, the jurisdiction of the appellate court attaches instantaneously, rendering the cause beyond the jurisdiction of the trial court. *State ex rel. Beeler, Schad and Diamond, P.C. v. Target Corp.*, 367 Ill. App. 3d 860, 863 (2006). However, this general rule applies only to a "proper" notice of appeal. Where the order appealed from is not final and appealable, the filing of the notice of appeal does not vest this court with jurisdiction. *State ex rel. Beeler, Schad and Diamond, P.C.*, 367 Ill. App. 3d at 863-64; *Welch v. City of Evanston*, 181 Ill. App. 3d 49, 55 (1989). Rather, jurisdiction remains with the circuit court. *State ex rel. Beeler, Schad and Diamond, P.C.*, 367 Ill. App. 3d at 863-64; *Welch*, 181 Ill. App. 3d at 55.

¶ 10 Plaintiff argues that her notice of appeal was properly filed. In support of this argument, she relies on *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). In *Artuz*, the Supreme Court held that an application for state post-conviction or other collateral review is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, including, for example, those prescribing the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *Artuz*, 531 U.S. at 8. *Artuz* addresses the filing of post-conviction petitions; it does not speak to the issue of the filing of a notice of appeal and whether there is a corresponding transfer of jurisdiction from a circuit court to an appellate court. As such, it does not support plaintiff's position. In contrast, *State ex rel. Beeler, Schad and Diamond, P.C.*, and *Welch* are directly on point in holding that if the order being appealed from is not final and appealable, the notice of appeal neither deprives the trial court of jurisdiction to proceed with the case nor vests the appellate court jurisdiction to review. *State ex rel. Beeler, Schad and Diamond, P.C.*, 367 Ill. App. 3d at 863-64; *Welch*, 181 Ill. App. 3d at 55.

¶ 11 Here, the order appealed from was not final and appealable. Accordingly, when plaintiff filed a notice of appeal, this court did not obtain jurisdiction. Therefore, a refiling before dismissal of the appeal would not have been subject to dismissal under section 2-619(a)(3) of the Code, which allows dismissal if there is another action pending between the same parties for the same cause. 735 ILCS 5/2-619(a)(3) (West 2010). Accordingly, plaintiff's arguments fail.

¶ 12 Plaintiff failed to refile her action within one year of the date when her case was dismissed for want of prosecution. Accordingly, defendants' motion to dismiss pursuant to section 2-619(a)(5) was properly granted.

¶ 13 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 14 Affirmed.